72-1453

Supreme Court, U.S.
FILED
APR 25 1973
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-1453

[redacted]

NORTON Y. BEILENSON,
Petitioner,

vs.

TREASURER OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

NORTON Y. BEILENSON
Petitioner-Counsel
DONALD S. SINGER
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Clayton, Missouri 63105
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No.

MELVIN LEROY TYLER
vs.
WARDEN LARK, et al.

NORTON Y. BEILENSON,
Petitioner,
vs.
TREASURER OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

Norton Y. Beilenson, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on January 25, 1973.

OPINIONS BELOW

This cause was decided by the United States Court of Appeals on January 25, 1973, in an opinion which has not yet been officially reported. The opinion is reproduced as Appendix A hereto (App. A p. A-1).

On January 25, 1973, the Court of Appeals affirmed the decision of the United States District for the Eastern District of Missouri denying petitioner's "Motion for an Attorney's Fee, and that the Treasurer of the United States Be Made a Party to This Action". The judgment of the Court of Appeals is reproduced as Appendix B hereto (App. B p. A-7). The order of the District Court is reproduced as Appendix C hereto (App. C p. A-8). Neither decision has yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 25, 1973 (See Appendix B p. A-7).

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

I

Whether a United States District Court Judge who has appointed a private attorney to represent an indigent plaintiff in a civil rights action has constitutional authority to order compensation be paid that attorney under the Fifth Amendment.

II

Whether a United States District Court Judge who has appointed a private attorney to represent an indigent plaintiff in a civil rights action has statutory authority to compensate that attorney under Title 18 U.S.C., Sec. 3006A (1970).

III

Whether a United States District Court Judge who has appointed a private attorney to represent an indigent plaintiff in a civil rights action has inherent authority to order compensation be paid that attorney.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments to Constitution of the United States

V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes of the United States

Title 18, United States Code

Sec. 3006A.

(a) Choice of Plan. Each United States District Court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation . . . (4) for who the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel.

Title 42, United States Code

Sec. 1983.

Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regulation, . . .

of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 28, United States Code

Sec. 1915.

Proceedings in Forma Pauperic. (d) The Court may request an attorney to represent any such person unable to employ counsel . . .

STATEMENT

This Petition arises from an original civil action brought by a prisoner who was allegedly beaten by guards in the St. Louis City Jail in violation of his rights as authorized by 42 U.S.C. Sec. 1983 in the United States District Court for the Eastern District of Missouri, Eastern Division, James H. Meredith, Judge.

Your petitioner-counsel's involvement in this matter began with the following communication dated May 25, 1971:

"Dear Mr. Beilenson:

You are appointed as attorney for the plaintiff in the above (civil) case, and by copy of this letter to the United States Attorney, I'm directing him to bring the plaintiff from the Missouri State Penitentiary in Jefferson City and have him available for you at the City Jail on or about October 1, 1971, for an interview.

Trial in this matter is set on Tuesday, October 26, 1971.

Yours truly,

James H. Meredith"

(Appendix D p. A-7)

Prior to trial, plaintiff's counsel moved the Court for "An Attorney's Fee, and That the Treasurer of the United States Be Made a Party to This Action" (Appendix D p. A-10). This motion was overruled as being premature.

Subsequent to trial on April 21, 1972, along with a Motion for New Trial, counsel filed a separate Motion for "An Attorney's Fee, and That the Treasurer of the United States Be Made a Party to This Action," incorporating the earlier motion and adding a detailed time sheet (Appendix D p. A-13) for services rendered during the course of his appointment.

This motion was denied without hearing on April 26, 1972. (Appendix D p. A-22).

From denial of counsel's motion, counsel took an appeal "for the plaintiff above named, individually and on his own behalf." (Appendix D p. A-23).

On January 25, 1973 the Eighth Circuit Court of Appeals entered its opinion (Appendix A p. A-1) and judgment affirming the trial court's denial. (Appendix B p. A-7).

REASONS FOR GRANTING THE WRIT

I. Authority to Grant to Attorney Fees Under the Fifth Amendment.

The Fifth Amendment reads in part:

> ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

If Congress had directed a licensed architect to draw plans for a new Federal Building, or authorized psychiatric examinations by licensed psychiatrists, there is little doubt that the Fifth Amendment would protect that individual's right to compensation. The problem with applying the same principles to licensed attorneys is the history of the legal profession of accepting criminal appointments without compensation. The legal justification for such practices is slim, and the legal tradition quite lengthy. When such is the case, change comes quite begrudgingly to the judiciary.

In 1964 Congress began to recognize the inequities of such a system of criminal justice and passed 18 U.S.C. Sec. 3006A to compensate attorneys. This action staved off a Constitutional challenge from weary attorneys, burdened by the Constitutional challenge from weary attorneys, burdened by the Constitutional mandates of the United States Supreme Court expanding the right to counsel for indigents.

More recently Congressional authorization for appointed counsel in civil cases where the party is indigent have added anew to the Court's power to order attorneys to labor without compensation. 28 U.S.C. Sec. 1915.

The situation in civil cases again became critical with the growth of post-conviction civil remedies. Congress again acted to avoid a crisis by amending 18 U.S.C. Sec. 3006A in 1970 to include such actions.

The Federal practice of appointing attorneys to represent indigents in claims for civil damages has no foundation in ancient tradition. Moreover, such counsel is appointed only in exceptional cases. **United States v. Madden,** 352 F 2d 792 (9th Cir. 1965). The limited nature of such service has two implications:

1. There is no impending crisis to prompt the Congress to action.
2. The financial burden of non-paying federal appointments rests upon very few members of the bar.

Thus, although the need for compensation strikes dearly at the few who must sacrifice several months time for no pay, the only redress can come from the forthright evaluation by the Federal Courts.

In the case at bar, a single attorney has contributed three days in trial, extensive travel, extensive pre-trial discovery —a total in all of 168 man hours with the consolation that he is the "exceptional case", and that he completed his job to the best of his ability as directed by Congress and ordered by the Court. Meanwhile, his professional overhead has continued for this period, his secretaries have had to be paid, his landlord, etc., not to mention his own personal expenses to care for his own family.

The lower court had no qualms about what it did in this case. However, other Federal Courts have not been so certain of their power to appoint under such circumstances:

> "Plaintiff is without counsel and therefore unable in the circumstances, according to his communications on file herein, to prepare or have his case properly prepared for trial and is unable to himself appear or to be represented by counsel in any court proceedings in the matter including the trial thereof. Plaintiff has, on several occasions, requested appointment of counsel by the court but this court concludes that it does not have the

> authority to order a lawyer to represent plaintiff without payment for his circumstances in this case, to-wit, where plaintiff is a state prisoner confined in a California state penal institution and the action is a civil suit for relief under the United States Civil Rights Act." **Diaz v. Chatterton,** 299 F. Supp. 19, 23 (S.D.Cal. 1964).

The **Diaz** case was prompted by a 42 U.S.C. Sec. 1983 action as is the case here.

In **Allison v. Wilson,** 277 F. Supp. 271 (N.D.Cal. 1967), another Sec. 1983 Action, a different District Court suggested another alternative:

> "Appointment of counsel to an indigent incarcerated plaintiff in a civil action implicitly authorizes the commitment of federal funds to underwrite necessary expenditures." Id at 275 (dicta).

Your petitioner contends that a commitment of a professional, private citizen's livelihood to a public use by Congress and the Court implicitly and Constitutionally requires just compensation.

II. Authority to Grant Attorney's Fees Pursuant to 18 U.S.C. Sec. 3006A (1970).

The relevant section of 18 U.S.C. Sec. 3006A (1970), reads as follows:

> (a) Choice of Plan.—Each United States District Court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation . . . (4) for who the Sixth Amendment to the Constitution requires the appointment of counsel **or for whom, in a case in which he faces loss of liberty, and Federal law re-**

quires the appointment of counsel (Emphasis ours).

An action by an incarcerated prisoner to vindicate his civil rights and thus to deter similar future occurrences certainly involves the possibility of substantial loss of liberty. The history and enactment of 42 U.S.C. Sec. 1983 after the Civil War attests to this fact.

It is clear, if the Court so construes the case at bar, petitioner-counsel is entitled to compensation. However, to determine coverage under this 1970 amendment, we must first determine the intent of the Congress.

Looking into the legislative history of the Amendment, we find the Congress anticipating some judicial intervention:

> "Section 1 (a) (4) extends coverage of the act to include those instances where judicial decisions may require appointment of counsel." 1970 U.S.C. Cong. Admin. News 3988.

and further still:

> "The committee believes that compensation should be available under the act whenever a judge determines that counsel must be appointed to safeguard the interests of justice." Id.

Your petitioner contends the letter and spirit of the 1970 Amendment to 18 U.S.C. Sec. 3006A authorize compensation to sub-section 1(a)(4) thereof. In the case at bar, the judge determined the need for counsel and appointed him. Compensation should follow.

III. Authority to Grant Attorney's Fees Within the Court's "Inherent Powers."

The Federal Courts, as with all Courts of jurisdiction, have been given authority to appoint special masters, commissions, and medical experts. These individuals in most

cases are financed by the "inherent power" of the Court to pay for these services as they are needed.

In an indigent case such as the one in question, Court costs, jury fees, fees for services of process and witnesses are not authorized by statute; but nevertheless, the Government bears the expense. 28 U.S.C. Sec. 1915(c).

> "Courts have inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction." 20 Am. Jur. 2d Courts Sec. 79 (1965).

CONCLUSION

Your petitioner respectfully contends he would be entitled to compensation either by Constitutional authority, by legislative mandates, or through the Court's "inherent powers."

Your petitioner therefore prays this Honorable Court to grant this petition for certiorari.

Respectfully submitted

NORTON Y. BEILENSON
Petitioner-Counsel
201 South Central, Suite 9
Clayton, Missouri 63105
and

DONALD S. SINGER
Attorney for Petitioner-Counsel
201 South Central, Suite 9
Clayton, Missouri 63105

This is to certify that a copy of the above and foregoing was mailed this 24 day of April, 1973, by prepaid postage, first-class United States Mail to Patrick Glynn, Assistant United States Attorney, 1114 Market Street, St. Louis, Missouri 63101.

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1271

Melvin Leroy Tyler,

vs.

Warden Lark, et al.

Norton Y. Beilenson, Appellant,

vs.

Treasurer of the United States, Appellee.

Appeal from the United States District Court, for the Eastern District of Missouri.

Submitted: November 17, 1972.

Filed: January 25, 1973.

Before MATTHES, Chief Judge, ROSS, Circuit Judge, and VAN PELT, Senior District Judge.*

VAN PELT, Senior District Judge.

Appellant was appointed to represent an indigent state prisoner in federal court. The prisoner had instituted a

* Senior District Judge for the District of Nebraska sitting by designation.

civil rights action based upon his claim of an alleged beating received in a St. Louis jail. In oral argument this court was informed that a trial to a jury, taking three days, was had, and that the verdict was for the defendants and against the civil rights plaintiff. Thus, there was no recovery out of which counsel could be compensated. Subsequent to the trial counsel filed a Motion for "An Attorney's Fee, and That the Treasurer of the United States Be Made a Party to This Action." The motion was denied without hearing and from its denial counsel takes this appeal.

Appellant's argument is threefold: (1) The denial of attorney's fees by the lower court violated counsel's Fifth Amendment rights in that his "private property was taken for public use, without just compensation." (2) The lower court abused its discretion by failing to award attorney's fees pursuant to 18 U.S.C. § 3006A (1970). (3) The lower court abused its discretion in not awarding attorney's fees within its "inherent power."

I. FIFTH AMENDMENT

Appellant asserts that irrespective of any statutory provisions for the payment of attorny's fees, such payment is constitutionally mandated by the Fifth Amendment which states that private property shal not be taken for public use without just compensation. For this proposition appellant cites *Allison* v. *Wilson,* 277 F.Supp. 271 (N.D. Cal. 1967), in which the court, in dictum, stated: "Appointment of counsel to an indigent incarcerated plaintiff in a civil action implicitly authorizes the commitment of federal funds to underwrite necessary expenditures." *Id.* at 275. The case is not strictly applicable here since it dealt not only with fees but also with other expenditures in the course of a civil action. In any event, we find it unpersuasive with regard to appellant's Fifth Amendment claim. An analysis of the historical back-

ground of our legal profession indicates that it has long been considered an obligation of counsel to represent indigents upon court order. *See* W. Beaney, Right to Counsel in American Courts (1955). Along with this historic obligation appears the rule that compensation for services is available only when provided by statute.[1] An overwhelming number of state courts have denied claims for nonstatutory just compensation.[2]

If it is true, then, that there was no common law right to compensation and that representation of indigents upon court order has been a traditional obligation of the lawyer which he assumes when he becomes a member of the bar, it follows that there has been no "taking" as that term is used in the Fifth Amendment.[3] As the Court in *United States* v. *Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), noted:

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[1] As the government points out, only three states have held that there is a non-statutory right to just compensation. **Knox County Council v. State ex rel. McCormick**, 217 Ind. 493, 29 N.E. 2d 405 (1940); **Hall v. Washington County**, 2 Iowa (G.Greene) 473 (1850); **County of Dane v. Smith**, 13 Wis. 584 (1861). In both Iowa and Wisconsin it was subsequently held that appointed counsel would be compensated only on the basis of statutory fee schedules. **Samuels v. County of Dubuque**, 13 Iowa 536 (1862); **Green Lake County v. Waupaca County**, 113 Wis 425, 89 N.W. 549 (1902).

[2] **Posey & Tompkins v. Mobile County**, 50 Ala. 6 (1873); **Arkansas County v. Freeman & Johnson**, 31 Ark. 266 (1876); **Lamont v. Solano County**, 49 Cal. 158 (1874); **Elam v. Johnson**, 48 Ga. 348 (1873); **Vise v. County of Hamilton**, 19 Ill. 78 (1857); **Case v. Board of Comm'rs**, 4 Kan. 511 (1868); **State v. Simmons**, 43 La. Ann. 991, 10 So. 382 (1891); **Bacon v. County of Wayne**, 1 Mich. 461 (1850); **Dismukes v. Board of Supervisors**, 58 Miss. 612 (1881); **Johnston v. Lewis & Clarke County**, 2 Mont. 159 (1874); **Kelley v. Andrew County**, 43 Mo. 338 (1869); **People ex rel. Whedon v. Board of Supervisors**, 192 App. Div. 705, 183 N.Y.S. 438 (1920); **Washoe County v. Humboldt County**, 14 Nev. 123 (1879); **Wayne County v. Waller**, 90 Pa. 99 (1879); **Ruckenrod v. Milans**, 102 Utah 548, 133 P.2d 325 (1943); **Presby v. Klickitat County**, 5 Wash. 329, 31 P. 876 (1892).

[3] Since it is unnecessary to the holding we do not decide whether the attorney's services are "property."

"An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.' "[4]

II. 18 U.S.C. § 3006A (1970)

The relevant section of 18 U.S.C. § 3006A (1970) reads:

"Each United States District Court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation . . . (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel."

The appellant's argument that his representation in the instant case falls within the ambit of this statute fails for three reasons. First, the statute speaks of the possible future loss of liberty. The statute under which the in-

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[4] The Court in **Dillon** correctly points out that the problem of compensation is a legislative matter. Prior to the enactment of compensation statutes the obligation of representation existed without the correlative right to receive attorneys fees. **Dolan v. United States**, 351 F.2d 671 (5th Cir. 1965). Compensation statutes in general, and the federal statute in particular [18 U.S.C. § 3006A (1970)], alleviate the burden on the profession only partially, for they provide limited compensation and apply only in certain enumerated actions. Therefore, we perceive no justification for distinguishing representation in criminal matters from representation in civil matters in regard to the question of nonstatutory just compensation rights.

digent plaintiff brought his action below, 42 U.S.C. § 1983 (1970), is designed to provide a means of redress for past violations of civil rights. Therefore, the action below simply does not come within the statutory language. Second, it is obvious from the language of the statute and from relevant legislative history that the statute was intended to provide legal assistance to indigent defendants in criminal cases. *Ray* v. *United States,* 367 F.2d 258 (8th Cir. 1966), *cert. denied,* 386 U.S. 913 (1967). The 1970 amendments to the statute allow compensation to an attorney for representation in connection with a post-trial motion made after the entry of judgment, and for compensation for attorneys for representation of persons seeking relief under Sections 2241, 2254 and 2255 of Title 28, United States Code, or Section 4245 of Title 18, United States Code. Prior to these 1970 amendments compensation in such instances was not available. *Cf. Dragon* v. *United States,* 414 F.2d 228 (5th Cir. 1969). The amendments do not provide for compensation in actions under the civil rights statutes. The only conclusion that can be drawn is that representation in such an action is not compensable. Third, the purpose of the statute is to protect indigent defendants and not to provide compensation in whole or in part for appointed counsel. *Cf. United States* v. *Harper,* 311 F.Supp. 1072 (D.D.C. 1970); *United States* v. *James,* 301 F.Supp. 107 (W.D. Tex. 1969). The interpretation of the statute reached here is thus more in keeping with this purpose.

III. *Inherent Power*

Appellant asserts that federal courts have inherent powers to do that which is necessary to the administration of justice, including the awarding of attorney's fees, and that it was an abuse of the lower court's discretion in the instant case not to exercise its inherent power in granting

an award of fees. Such an argument is insufficient to sustain reversal here. An analogy to the power of courts to appoint and compensate medical experts, special masters or commissions misses the mark because attorneys, unlike these other groups, have a special relationship to the administration of justice; they are officers of the court and thereby have a duty to serve when called upon to do so. *Powell* v. *Alabama*, 287 U.S. 45, 73 (1932). There is no reading of the statutes relating to representation of the poor[5] which would support payment of attorneys fees in the instant case. This court, through the use of such a nebulous concept as inherent powers, will not attempt to circumvent the carefully defined limits for the payment of attorneys fees, which the Congress of the United States, after many hearings and resulting study, has enacted.

The denial of Mr. Beilenson's motion is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[5] 18 U.S.C. § 3006A (1970); 28 U.S.C. § 1915 (1970).

APPENDIX B

JUDGMENT

(Filed January 25, 1973)

United States Court of Appeals
for the Eighth Circuit

No. 72-1271 September Term, 1972

Melvin Leroy Tyler

vs.

Warden Lark
Norton Y. Beilenson,
Appellant,

vs.

Treasurer of the United States,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 25, 1973

APPENDIX C

United States District Court
Eastern District of Missouri
Office of the Clerk
Saint Louis, Missouri 63101

April 26, 1972

Mr. Norton Y. Beilenson
201 South Central
Clayton, Mo. 63105

Mr. John Fitzgibbon
City Counselor
Room 314 City Hall
St. Louis, Mo. 63103

RE: Civil Case 70C 588(1)
Tyler v. Lark, et al.

Gentlemen:

Under this date the following action occurred in the above entitled case . . .

Before Judge James H. Meredith

Motion of plaintiff for a new trial, and separate motion of Norton Y. Beilenson for an attorney's fee, and that The Treasurer of the United States be made a party to this action, heretofore filed under date of April 21, 1972, are now denied.

Very Truly Yours
LEO C. DeVOTO
Clerk
ANN KINDER
Deputy

AK
cc: Mr. Melvin L. Tyler

APPENDIX D

James Meredith, District Judge
Telephone: 622-4217, Area Code 314

United States District Court
Eastern District of Missouri
U. S. Court House and Custom House
St. Louis, Missouri 63101

May 25, 1971

Mr. Norton Y. Beilenson
201 South Central
St. Louis, Missouri

Re: Melvin Leroy Tyler v. Warden Lark, et al.,
No. 70 C 588 (1)

Dear Mr. Beilenson:

You are appointed as attorney for the plaintiff in the above case, and by copy of this letter to the United States Attorney I'm directing him to bring the plaintiff from the Missouri State Penitentiary in Jefferson City and have him available for you at the City Jail on or about October 1, 1971, for an interview.

Trial in this matter is set on Tuesday, October 26, 1971.

Yours truly,

JAMES H. MEREDITH

cc: Melvin Leroy Tyler
No. 09670
Box 900, Missouri State Penitentiary
Jefferson City, Missouri 65101
Messrs. Robert W. Van Dillen and
John J. FitzGibbon
Room 314, City Hall, St. Louis, Missouri
United States Attorney
St. Louis, Missouri

In the United States District Court
Eastern District of Missouri
Eastern Division

Melvin Leroy Tyer,
Plaintiff,

vs.

No. 70C 588 (1)

Warden Lark, et al.,
Defendants.

MOTION FOR AN ATTORNEY'S FEE, AND THAT THE TREASURER OF THE UNITED STATES BE MADE A PARTY TO THIS ACTION

Comes now Norton Y. Beilenson, Court appointed attorney for Plaintiff, Melvin Leroy Tyler, and states to this Court:

1. That the Court appointed the undersigned attorney to act as Plaintiff's attorney in this civil suit for damages, and this attorney did not voluntarily take this case, and would not have done so but for the fact that the Court appointed him to act as attorney for Plaintiff.

2. That the compelling of this attorney to act as such for the Plaintiff in this civil suit for damages violates the prohibition against involuntary servitude as guaranteed by the Constitution of the United States of America.

3. That the Congress of the United States enacted into law the provisions of "Chapter 21—Civil Rights", title 42, Sections 1981 through 1995, and particularly Section 1983; and also enacted into law Title 23, Section 1343, under which Plaintiffs suit in this case was brought and which

guaranteed his freedom from cruel and unusual punishment by giving him a civil action against any Governmental unit whose servants either conspired together to deprive him of such freedom, or acting under color of State law, did deprive him of such freedom.

4. Plaintiff was found indigent and given Leave by this Court to proceed in forma pauperis, since the Court must have found that no one shall be denied the right to enforce their civil rights because they are poor. Congress must have so intended.

5. That your attorney hereunder has expended over Eighty (80) hours of his time, to date, at the time of the filing of this Motion, and will expend considerable time in the future, and that your Petitioners time is reasonably worth Thirty Five Dollars ($35.00) per hour.

6. Congress could not have so intended that such rights should be enforced by compelling an attorney to handle a case without intending such attorney should be compensated, as such would be without due process and would be involuntary servitude. Therefore, Congress must have intended the attorney to be compensated, and that the Treasury of the United States should pay this attorneys fee, and consent by the United States to be sued for such fee is thereby implied in the cited Sections.

Wherefore, your Petitioner moves that the Treasurer of the United States be made a party to this case, that service of summons with a copy of this pleading be ordered to issue to said Treasurer; that a hearing be held as to the services that have been rendered by this attorney, and to be rendered by this attorney; that the Court allow a reasonable sum for services already rendered, and that the Court allow a reasonable sum for services to be rendered in the future; that upon determination of what sums are reasonable, that the Court enter judgment against the Treasurer of the United States for said reasonable sums,

and in favor of Plaintiff with a further order that such sums as are adjudged be paid directly to the undersigned attorney by the said Treasurer, together with any costs herein expended, that all necessary and proper orders and other relief to effectuate these ends be made as to the Court seems just and proper.

NORTON Y. BEILENSON
Court Appointed
Attorney for Plaintiff
201 South Central, Suite 9
Clayton, Missouri 63105
725-5510

In the United States District Court
Eastern District of Missouri
Eastern Division

Melvin Leroy Tyler,
Plaintiff,

vs.

Warden Lark, et al.,
Defendants.

No. 70C 588 (1).

MOTION FOR AN ATTORNEY'S FEE, AND THAT THE TREASURER OF THE UNITED STATES BE MADE A PARTY TO THIS ACTION

Comes now Norton Y. Beilenson, Court appointed attorney for Plaintiff, Melvin Leroy Tyler, and states to this Court:

1. That said attorney had previously filed his "Motion for an Attorney's Fee, and That the Treasurer of the United States Be Made a Party to This Action" and that this Court denied same at such time indicating that it was prematurely filed.

2. That the undersigned, Court appointed attorney does hereby refile said Motion and attaches hereto a copy thereof and incorporates same hereat as though fully set forth and made a part hereof.

3. That attached hereto and made a part hereof and incorporated herein as though fully set forth hereat is an itemized "Time Sheet" which sets forth the work and hours done by said attorney in the preparation and trial of said case herein. That said "Time Sheet" shows a total of One Hundred and Sixty-Eight (168) hours expended herein.

4. That your Petitioner's time is reasonably worth the sum of Thirty-Five ($35.00) Dollars per hour and therefore your Petitioner states that he should be paid the sum of Five Thousand Eight Hundred and Eighty ($5,880.00) Dollars for the time spent on this case. That said sum does not include monies spent by your Petitioner for paper, long distance telephone calls, travel expenses and miscellaneous office supplies.

Wherefore, your Petitioner moves that the Treasurer of the United States be made a party to this case, that service of summons with a copy of this pleading be ordered to issue to said Treasurer; that a hearing be held as to the services that have been rendered by this attorney; that the Court allow the sum of Five Thousand Eight Hundred and Eighty ($5,880.00) Dollars to your Petitioner herein for services rendered and that the Court enter judgment against the Treasurer of the United States for said sum and in favor of your Petitioner herein with the further order that such sum be paid directly to the undersigned attorney by the said treasurer with all further necessary and proper orders and other relief to effectuate these ends as to the Court seems just and proper.

NORTON Y. BEILENSON
Court Appointed Attorney for
Plaintiff
201 South Central, Suite 9
Clayton, Missouri 63105
725-5150

This is to certify that a copy of the above and foregoing was mailed this 20th day of April, 1972, by prepaid postage, first-class United States Mail to Mr. John FitzGibbon, Attorney for Defendants, 314 City Hall, St. Louis, Missouri 63101, and Melvin Leroy Tyler, Plaintiff, Register No. 09670, Missouri State Penitentiary, Jefferson City, Mo. 65101.

NORTON Y. BEILENSON

In the United States District Court
Eastern District of Missouri
Eastern Division

Melvin Leroy Tyler,
Plaintiff,
vs.
Warden Lark, et al.,
Defendant.
No. 70C 588(1).

MOTION FOR AN ATTORNEY'S FEE, AND THAT THE TREASURER OF THE UNITED STATES BE MADE A PARTY TO THIS ACTION

Comes now Norton Y. Beilenson, Court appointed attorney for Plaintiff, Melvin Leroy Tyler, and states to this Court:

1. That the Court appointed the undersigned attorney to act as Plaintiff's attorney in this civil suit for damages, and this attorney did not voluntarily take this case, and would not have done so but for the fact that the Court appointed him to act as attorney for Plaintiff.

2. That the compelling of this attorney to act as such for the Plaintiff in this civil suit for damages violates the prohibition against involuntary servitude as guaranteed by the Constitution of the United States of America.

3. That the Congress of the United States enacted into law the provisions of "Chapter 21-Civil Rights", title 44, Sections 1981 through 1995, and particularly Section 1983; and also enacted into law Title 23, Section 1343, under which Plaintiff's suit in this case was brought and which guaranteed his freedom from cruel and unusual punish-

ment by giving him a civil action against any Governmental unit whose servants either conspired together to deprive him of such freedom, or acting under color of State law, did deprive him of such freedom.

4. Plaintiff was found indigent and given Leave by this Court to proceed in forma pauperis, since the Court must have found that no one shall be denied the right to enforce their civil rights because they are poor. Congress must have so intended.

5. That your attorney hereunder has expended over Eighty (80) hours of his time, to date, at the time of the filing of this Motion, and will expend considerable time in the future, and thaty our Petitioner's time is reasonably worth Thirty Five Dollars ($35.00) per hour.

6. Congress could not have so intended that such rights should be enforced by compelling an attorney to handle a case without intending such attorney should be compensated, as such would be without due process and would be involuntary servitude. Therefore, Congress must have intended the attorney to be compensated, and that the Treasury of the United States should pay this attorney's fee, and consent by the United States to be sued for such fee is thereby implied in the cited Sections.

Wherefore, your Petitioner moves that the Treasurer of the United States be made a party to this case, that service of summons with a copy of this pleading be ordered to issue to said Treasurer; that a hearing be held as to the services that have been rendered by this attorney, and to be rendered by this attorney; that the Court allow a reasonable sum for services already rendered, and that the Court allow a reasonable sum for services to be rendered in the future; that upon determination of what sums are reasonable, that the Court enter judgment against the Treasurer of the United States for said reasonable sums, and in favor of Plaintiff with a further order that such

sums as are adjudged be paid directly to the undersigned attorney by the said Treasurer, together with any costs herein expended, that all necessary and proper orders and other relief to effectuate these ends be made as to the Court seems just and proper.

NORTON Y. BEILENSON
Court Appointed Attorney for Plaintiff
201 South Central, Suite 9
Clayton, Missouri 63105
725-5150

In the United States District Court
Eastern District of Missouri
Eastern Division

Melvin Leroy Tyler,
Plaintiff,
vs.
Warden Lark, et al.,
Defendants.
No. 70C 588 (1)

TIME SHEET

	Hours
Review of letter from Judge Meredith; telephone conversation with Jack FitzGibbon; telephone conversation with Clerk for Judge Meredith; letter to client, preparation of medical and arrest record authorizations; review of letters from client; letters to Warden and review of reply;	
Review of previous suit filed by client and review of present suit and all pleadings; conversation with Judge Meredith's law clerk; visit to Penitentiary, Jefferson City, Missouri, interview with client, and inmates, Parker, Cochran and Franklin;	
Letters to and from Judge Meredith and U. S. Attorney; review of letters from Mr. Baldwin; letters from client; letter to Warden Swenson;	
Telephone conversation with Warden Swenson and his secretary; letters to possible witnesses; visit to Penitentiary and Moberly Institution; interview with Warden Swenson, Attorney Fitzgerald, Guards Turner and Hagelin, Associate Warden Wyrick, Dr. Baker, Chaplain Garriott, Clerk Lauf, client and inmates, Cochran, Henry, Hall, Coleman and Bell.	29½

Letter to Dr. Baker and review of reply; letters to Warden and witnesses; letters from client. ....

Preparation, drafting and filing of: Motion for Additional Parties; Motion to Amend Pleadings; Motion to Furnish Reports; Interrogatories; Motions for Subpoenas and Writs for Habeas Corpus Testificandum; all with necessary affidavits and writs; Letter to Judge Meredith; letters to client; review of Court's orders; telephone conversation with Mr. Baldwin and U. S. Attorney; 22

Preparation, drafting and filing of additional issuance of subpoenas,; additional amendments to pleadings and additional parties,; interview with Honorable John J. Kelly, Judge, Beatrice Laut, Court Reporter, and Mr. William Kirby, attorney; preparation of U. S. Marshal Form 285; .....

Review of Answers and Objections to Interrogatories of Walter Young and Warden Lark; interview at City Jail with Charles Comer; .....

Interview with client at St. Charles County Jail; review of letter from client; telephone conversation with client's mother; letter to Dr. Baker and review of medical records sent by Dr. Baker; 8

Telephone conversation with Jim Barton, Associate City Attorney, City of St. Louis; preparation, drafting and filing of Motion for Subpoena Duces Tecum on deposition; picking up copy of statement from City Counselor; review of same and copy with letter to client; review of transcript of client's 27.26 Motion of October 9, 1970 and other depositions of client; letters to F.B.I., Metropolitan St. Louis Police Department, and U. S. Attorney; preparation, drafting and filing of Interrogatories and Supplemental Interrogatories; 6

Review of letter from client and from Mr. Fitz-Gibbon; telephone conversation with attorney, William Shock; letter to Court; letter to Board of Police Commissioners, Review of letters from Seneca Nolan; letter to client; review of police report;

Letters to Office of U. S. Attorney; and client and Warden Swenson; preparation, drafting and filing of Plaintiff's Objections to Defendants' Interrogatories; Plaintiff's Answers to Interrogatories; review of Defendants' Interrogatories and Answers; Plaintiff's Motion to Compel Answers; Motion to Pay Witnesses Fees; Request for Inspection; Motion to Fix a Day Certain; trips to Marshal's Office, Form 285; telephone conversation with Mr. Murphy, U. S. Attorney's Office; letter to client and U. S. Attorney's Office; telephone conversation with Agent Johnson; 11

Letter to Plaintiff and Judge Kelly; letter from Judge Meredith; pre-trial conference with Fitz-Gibbon and Judge Meredith; review of Defendant's Answers to Interrogatories; preparation of Stipulation and Order; preparation and filing of Plaintiff's Supplemental Answers to Interrogatories; telephone conversation with Dr. Baker; letter to Judge Meredith and research; .....

Trial review—pleadings; statements; legal research; voir dire; opening statement; medical documents; interview with Tyler and Cochran at St. Charles County Jail; interview with Henry, Franklin, Parker and Coleman at St. Louis City Jail; interview with F.B.I. agent Walter Johnson; 31

Depositions St. Charles County Jail of Tyler and Cochran; depositions of Comer, Coleman, Parker Franklin, St. Louis City Jail; .....

Trial preparation voir dire—opening statement, etc.; trial preparation, instructions, visit with client and other prisoners, St. Charles County Jail; telephone conversation with Guard Hagelin; telephone conversation with Warden Wyrick; trial preparation;	32½
Trial of case; preparation of post trial Motions. ..	28
Total Hours	168
$35.00 Per Hour	$5,880.00

United States District Court
Eastern District of Missouri
Office of the Clerk
Saint Louis, Missouri 63101

Leo C. Devoto, Jr., Clerk

April 26, 1972

Mr. Norton Y. Beilenson,
201 South Central,
Clayton, Mo. 63105

Mr. John Fitzgibbon,
City Counselor,
Room 314, City Hall,
St. Louis, Mo. 63103

RE: Civil Case 70C 588(1)
Tyler vs. Lark, et al.

Gentlemen:

Under this date the following action occurred in the above entitled case . . .

BEFORE JUDGE JAMES H. MEREDITH

Motion of plaintiff for a new trial, and separate motion of Norton Y. Beilenson for an attorney's fee, and that The Treasurer of the United States be made a party to this action, heretofore filed under date of April 21, 1972, are now denied.

Very truly yours,
Leo C. DeVoto, Jr., Clerk
Ann Kinder
Deputy

AK
cc: Mr. Melvin L. Tyler.

United States District Court
For the Eastern District of Missouri
Eastern Division

Melvin Leroy Tyler,
Plaintiff,
vs.
Warden Lark, et al.,
Defendants.
No. 70C 588 (1)

NOTICE OF APPEAL

(Filed May 4, 1972)

Notice is hereby given that Melvin Leroy Tyler, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from order and judgment entered on or about April 12, 1972, in favor of Defendants Walter Young, Fay Short, Steve Reeves, Robert Perkins, Willie Zachary, Joseph C. Gunnell, and Warden Alphonso Lark, and against Plaintiff, Melvin Leroy Tyler, and Plaintiff appeals from the final order of the Honorable James H. Meredith entered by him and against Plaintiff on April 26, 1972 ordering the motions of said Plaintiff to this case overruled, said Motions being described as: Motion of Melvin Leroy Tyler for New Trial; Motion and Offer of Proof to Support the Motion for New Trial; Supplement to Motion for New Trial; and Motion for an Attorney's Fee and That the Treasurer of the United States Be Made a Party to This Action.

Norton Y. Beilenson
Court appointed Attorney for
Plaintiff Melvin Leroy Tyler
201 South Central, Suite 9
Clayton, Missouri 63105
725-5150

This is to certify that a copy of the above and foregoing was mailed this 4 day of May, 1972, by prepaid, postage first-class United States Mail to Mr. John FitzGibbon, Attorney for Defendants, 314 City Hall, St. Louis, Missouri and Melvin Leroy Tyler, Plaintiff, Register No. 09670, Missouri State Penitentiary, Jefferson City Missouri 65101, (Illegible).

Norton Y. Beilenson

Note to Clerk: Service of a copy of this Notice of Appeal should be made on Mr. John Fitzgibbon, Attorney for Defendants, 314 City Hall, St. Louis, Missouri, and U. S. Attorney, 1114 Market Street, St. Louis, Mo.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1453

NORTON Y. BEILENSON, PETITIONER

v.

TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an attorney, was appointed by the United States District Court for the Eastern District of Missouri to represent an indigent state prisoner in a civil suit he filed under 42 U.S.C. 1983 for damages based on the prisoner's claim of an alleged beating in a St. Louis jail. In that action, the jury held for the defendant. After trial, petitioner renewed his pre-trial motion for an attorney's fee and to make the Treasurer of the United States a party.[1] The district court denied the motion, and the court of appeals affirmed (Pet. App. A).

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[1] The title of this case is misleading, since this an appeal from an order issued in *Tyler* v. *Warden Lark, et al.*, No. 70C 588(1) (E.D. Mo.), affirmed, No. 72-1271 (C.A. 8), which denied petitioner's motion to make the Treasurer of the United States a party. We do not concede, by our appearance below and in this Court,

The courts below did not abuse their discretion in denying petitioner's motion for an attorney's fee, and further review is unwarranted. For the reasons set forth in the court of appeals' opinion (Pet. App. A), upon which we rely, there is no statutory or constitutional right to an attorney's fee in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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that the Treasurer is a proper party. See F. R. Civ. P., Rule 12(b); *Orange Theatre Corp.* v. *Rayhersiz Amusement Corp.*, 139 F. 2d 871 (C.A. 3), certiorari denied, 322 U.S. 740.

DOJ-1973-06